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Supreme Court of the United States

October Term, 1932.

No. 407.

GEORGE B. MUNROE, Receiver,
Petitioner,

v.

LOUIS RAPHAEL,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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LAWYERS BRIEF & PUBLISHING CO.
BOSTON, MASS.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

On a bill in equity entitled "J. B. Hirshfield & Co., Inc., *et al.*, Plaintiffs v. Monroe Stores, Inc.," filed in the United States District Court for the District of Massachusetts on July 14, 1930 by three creditors of said Monroe Stores, Inc., the petitioner was, on July 23, 1930, appointed, by consent, receiver of the assets and property of said corporation (Rec. p. 2, pars. A, C, and D). On November 10, 1930 an order was entered, on a petition filed that day by the receiver, granting him authority "to advertise for sealed bids for all the assets and property of the defendant corporation, including cash on hand, merchandise, fixtures, good-will and all other assets." (Rec. p. 3, par. F.)

On November 25, 1930, one, Harold A. Dempsey filed an offer whereby, in consideration of the transfer to him of all the assets (Rec. pp. 12 to 15 incl.) he bound himself to pay to creditors of said Monroe Stores, Inc., thirty per cent of their respective claims "in or within thirty days after their claims have been duly approved and allowed" (Rec. p. 12, par. 1), and also to pay "any and all liabilities of the receiver [for merchandise, administration expenses, counsel fees, etc., not exceeding twenty thousand dollars ($20,000.00)] within thirty days after said claims against the receiver have been duly allowed by this court" (Rec. p. 13, par. 2). By said offer, said Dempsey also promised, among other things, to file in court within seven days after the acceptance thereof, "a bond in the penal sum of one hundred thousand dollars with good and sufficient sureties," (Rec. p. 14, par. 7). On November 26, 1930 said offer was accepted in pursuance to an order entered on that day, and thereafter, said Dempsey filed in said court a bond in the penal sum of one hundred thousand dollars, executed by him as principal and by Louis F. Buff and Clifford S. Drake as sureties (Rec. pp. 15 and 16).

By said bond, the principal and sureties bound themselves "unto the United States of America in the full and just sum of one hundred thousand dollars" for the purpose, therein recited, of "guaranteeing the performance" of the terms of said offer, said bond being upon the condition that "if the said Harold A. Dempsey shall comply with all the conditions and items of said offer, then this obligation to be void; otherwise to be and remain in full force and effect" (Rec. pp. 15 and 16). Said bond was approved by the court on December 2, 1930 after the respective sureties had filed affidavits (Rec. pp. 5 to 8 incl.) respectively itemizing their assets and stating the amount of their liabilities.

These affidavits show that the net worth of said Drake was "not less than $158,255.00" (Rec. p. 5) and that said Buff was "worth in good property not less than six hundred thousand dollars ($600,000.00) over and above all debts, liabilities, and lawful claims against me, and all liens, encumbrances and lawful claims against my property" (Rec. p. 8).

Upon the filing and approval of said bond, the receiver conveyed to Dempsey all the assets of Monroe Stores, Inc., including the cash on hand (Rec. p. 11, par. 6).

[This fact, as well as certain other facts hereinafter recited, are included by reference in paragraph H (Rec. p. 3) of the "Agreed Statement," which stipulates that "the statements concerning said offer and concerning the other proceedings set forth in the petition (appearing on pp. 9 to 16 incl. of the record), entitled 'Petition By Louis Raphael, A Creditor of Monroe Stores, Inc. For Leave To Institute Proceedings Upon Bond' — are true."

The court's attention is also respectfully directed to paragraph I of the "Agreed Statement" which stipulates that: "The statements set forth in the Plea of Louis Raphael (appearing on page 36 of the record) with respect to said proceedings in the Suffolk Superior Court in said case of United States of America, *ex rel.* Louis Raphael v. Dempsey, *et al.*, and with respect to the proceedings in said United States District Court in said case of J. B. Hirshfeld & Co., Inc., *et al.* v. Monroe Stores, Inc., are true."]

In pursuance to an order limiting the time within which persons holding claims against said Monroe Stores, Inc., might present their proofs of claim therefor, the respondent "duly presented" his proof of claim which was "duly approved and allowed" on February 9, 1931 in the sum of thirty-five thousand ($35,000.00) dollars (Rec. p. 10, par.

4). Dempsey, Drake and Buff "duly approved said claim and the amount thereof and the allowance thereof, and duly assented to and approved said allowance by their respective counsel." (Rec. p. 10, par. 4.) After the lapse of thirty days from the date of allowance of his said claim, the respondent, on March 12, 1931, "duly demanded" of said Dempsey, Drake and Buff, payment of thirty per cent of the amount thereof, to wit, $10,500.00 (Rec. pp. 10 and 11, par. 4). "Said Drake and Buff paid to said Raphael on account thereof the sum of twelve hundred dollars ($1200.-00), leaving an unpaid balance of ninety-three hundred ($9300.00) dollars" (Rec. pp. 36 and 37, par. 2).

As no payment was made on said balance, the respondent "communicated with said receiver" (Rec. p. 11, par. 4) and, "after conferring with said receiver and with his knowledge," (Rec. p. 37, par. 3), filed on March 23, 1931 in said District Court a petition (Rec. pp. 9 to 11 incl.) praying "that he may be authorized forthwith to institute and prosecute, in the name of the United States and for his benefit, an action to enforce said obligation of said principal and said sureties on said bond" (Rec. p. 11). The prayer of said petition was duly allowed by said court on March 23, 1931 (Rec. p. 12) and accordingly, the respondent, as "relator", did, on April 9, 1931 bring in the Massachusetts Superior Court for the County of Suffolk, a bill in equity, in the name of the United States of America, as obligee of said bond, against said Dempsey, as the principal and against said Drake and Buff as sureties to enforce their obligation on said bond. Said bill sought to reach and apply, under Massachusetts G. L. chap. 214, sec. 3, certain shares of stock and other property of said Drake and Buff toward the payment of said balance of $9300.00 due the respondent on his said claim. Said bill was en-

titled "United States of America, *ex rel.* Louis Raphael vs. Harold A. Dempsey, *et als.*" (Rec. p. 3, par. I) and a summary of said Bill is set forth in the record (pp. 42 to 45). In the Superior Court proceedings, the respondent "obtained and now has attachments upon property of said defendants, Drake and Buff and injunctions restraining the transfer by them of certain property, to secure the payment of the amount justly due him" (Rec. p. 39, par. 9).

Said State court proceedings were referred to a master who heard the evidence and filed a report of his findings (Rec. pp. 42 to 52 incl.). It appears by the findings in that report that Dempsey "was merely a straw and nominee for the defendants, Buff and Drake, and had no financial interest other than he was acting for them to purchase the property" (Rec. p. 48, par. 9), and that Dempsey received from Buff and Drake a bond to indemnify him "against any liability or loss as the result of the offer and on the bond which the said Dempsey signed as principal in the United States District Court." (Rec. p. 49, par. 14.)

The master finds Buff to be the owner of a large number of shares of stock in various corporations, viz., Henrici Laundry Machinery Co., Babson Dow Mfg. Co., Buff & Buff Mfg. Co. and others (Rec. pp. 50 and 51, pars. 19, 21, 22 and 23). Drake was found by the master to be the owner of shares of stock in Mullins Mfg. Co. and W. E. Noyes Co. (Rec. p. 51, par. 25) and to be the beneficial owner of a number of parcels of land which stood of record in the names of various nominees of said Drake, seven in number, said Drake holding "in his possession, unrecorded deeds from the respective nominees to himself as grantee." (Rec. p. 51, pars. 26 and 27). Drake was also found to have deposits in three banks and to be the holder of various mort-

gages on real estate aggregating approximately $150,000.00 (Rec. pp. 51 and 52, par. 28).

The master's report further shows that after Dempsey had obtained from the receiver the assets of Monroe Stores, Inc., Drake and Buff caused to be organized a Delaware corporation known as "Monroe Stores Corporation" and that said Dempsey, at their direction, transferred all said assets to said new corporation (Rec. p. 49, par. 16). The master reports that Drake testified before him "that *the only reason* he had for not paying the balance due the plaintiff [Louis Raphael] was because he (Drake) has an agreement from the Monroe Stores Corporation to save him harmless." (Rec. p. 52, par. 31.)

After denying motions filed by Drake and Buff to recommit the master's report, the Superior Court, on October 20, 1931, entered a decree confirming said master's report (Rec. p. 38, par. 6). No appeal having been claimed from said last mentioned decree, and the time for claiming an appeal having elapsed, your respondent filed in the Superior Court, on November 13, 1931, a motion for the entry of a final decree on said master's report, and submitted therewith for the consideration of the court a proposed form of final decree (Rec. pp. 31 to 34) "calculated to reach and apply in said Superior Court proceedings such stock certificates, mortgages, real estate and bank deposits of Drake and Buff as the master had found them to be possessed of upon the evidence adduced before him." (Rec. p. 38, par. 7.) After the filing of said motion for final decree, counsel for this respondent was served with a copy of the restraining order issued by the United States District Court (Rec. pp. 34 and 35).

It appears that subsequently to the commencement by the respondent of said equity proceedings in the State court,

the receiver filed in the original receivership proceedings in said United States District Court an "ancillary bill of complaint" against said Dempsey, Buff and Drake (Rec. pp. 16 to 20). Said ancillary bill recited said offer of Dempsey, and the filing of said bond and then alleged: "there is due from said Harold A. Dempsey on account of the obligations and expenses of the receiver and on account of the amounts *due the creditors* who have filed their claims, and which claims have been allowed by this court, a total balance of $34,856.14" (Rec. p. 17, par. 4).

On this ancillary bill of complaint, the United States District Court, on May 4, 1931, issued a temporary injunction against Dempsey, Drake and Buff, restraining them, "*until the further order of the court*" from transferring or encumbering their property or withdrawing funds from any banks (Rec. pp. 21 and 22). On July 16, 1931, a final decree on said ancillary bill was entered by consent of the parties thereto, which ordered that "judgment for the plaintiff in the sum of $33,026.83, together with costs be entered against the defendants, Clifford S. Drake, Louis F. Buff and Harold A. Dempsey, jointly and severally, and that execution issue forthwith" (Rec. p. 23). The final decree did not provide for the continuance of the temporary injunctions, but disposed of the ancillary bill of complaint by the order for the entry of said judgment and execution.

It appears by the stipulation in the record that this respondent (Raphael) "was not made a party to said ancillary bill of complaint—and that he has never taken any part in any hearings thereon" (Rec. p. 40, par. 12). It also appears by the record that the receiver was not a party to the State court proceedings (Rec. p. 37, par. 4), but that he knew of the State court proceedings, for the receiver and

one of his attorneys were called by this respondent as witnesses before the master appointed by the Superior Court (Rec. pp. 37 and 38, par. 5).

On October 7, 1931, the receiver filed in the United States District Court a petition against Buff and Drake to adjudge them in contempt for failure to pay the judgment entered upon said ancillary bill of complaint (Rec. pp. 23 to 28 incl.). The receiver alleged in said contempt petition that Buff and Drake "are financially able to pay the full amount of the judgment rendered against them in this cause and have in their possession and under their control assets, of which they are the actual owners, sufficient to satisfy in full the judgment" (Rec. p. 26, par. 15). No evidence was heard on said contempt petition, and, with the consent of the receiver, an order was entered requiring Buff and Drake to pay one thousand dollars ($1,000.00) per month, until the execution is satisfied (Rec. p. 29).

It appears by the record that this respondent (Raphael) was not a party to said contempt petition, received no notice of any proposed hearings or proceedings thereon and "has never taken part in any hearings" thereon (Rec. p. 40, par. 12).

On November 27, 1931, the receiver filed in the United States District Court in said original case of "J. B. Hirshfield, Inc., *et al.*, vs. The Monroe Stores, Inc., No. 2392 Eq.", a motion to modify the order which had been entered therein on March 23, 1931, authorizing this respondent to enforce the obligation of the bond in the name of the United States of America for his benefit. Said motion also prayed for an injunction against this respondent to restrain him from further prosecuting said State court proceedings "except

insofar as to reduce his claim to judgment" (Rec. pp. 30 and 31). On the return day of the order of notice issued on said motion, to wit, on December 3, 1931, this respondent appeared specially in the United States District Court by counsel and filed a plea to said motion (Rec. pp. 36 to 41). After a hearing on said motion and plea, a stenographic transcript of which appears in the record (Rec. pp. 54 to 63), the District Court, on December 7, 1931, entered an order modifying the order of March 23, 1931, and enjoining this respondent from further prosecuting his suit in the Superior Court "except that the said Louis Raphael may proceed in said cause to judgment, but no further" (Rec. pp. 63 and 64). The stenographic record shows that no evidence was offered by the receiver in support of his motion and that there was before the court no evidence other than said sworn plea (and the documents thereto annexed), the allegations of which plea, with respect to all the proceedings both in the State court and in the Federal court, are stipulated by the parties to be true (Rec. p. 4, par. I).

This order of December 7, 1931, was reversed on appeal by the United States Circuit Court of Appeals for the First Circuit in pursuance to an opinion of that court entered on June 27, 1932 (Rec. pp. 71 to 79 incl). From this reversal the petitioner seeks the writ of certiorari in this court.

Points and Authorities.

I. The State court proceedings brought by the respondent against the principal and sureties, to enforce their obligation to him on the bond, was not an interference with a res in the possession of the receiver.

A. The Obligation Sought to be Enforced in the State Court Proceedings was to Pay Direct to Creditors, Not to the Receiver.

The receiver was not the obligee of the bond, and it is clear that the obligation to pay the thirty per cent runs direct from Dempsey to the creditors. The receiver himself has admitted this. In his ancillary bill, he did not ask that the amounts due creditors be paid to him, but prayed that such sum be paid to the clerk of the United States District Court for the use and benefit of the creditors (Rec. p. 20, par. 2).

Again in the contempt petition, the receiver said expressly: ". . . said offer, in substance, provided that Harold A. Dempsey would *pay to the creditors* of the Monroe Stores, Inc. thirty per cent of the claims approved and allowed by this court." (Rec. p. 24, par. 3.) After referring to the bond as having been given to secure the performance of said obligation to "*pay to the creditors,*" the contempt petition alleges as the breach of said obligation, the failure "*to pay to the creditors* of The Monroe Stores, Inc. thirty per cent of the amount of their claims" (Rec. p. 25, par. 9).

The District Court recognized this direct obligation to the creditors when, on March 23, 1931, it granted this re-

spondent's petition for leave to institute proceedings thereon (Rec. pp. 9 to 12). In the very order which the Circuit Court of Appeals reversed, the District Court expressly recognized this direct obligation for the order stated that this respondent "may proceed in said cause to judgment." (Rec. p. 64.)

Moreover, Drake and Buff recognized their obligation direct to Raphael, when they made the payment of twelve hundred dollars ($1200.00) on account direct to him and not to, or through, the receiver. (Rec. pp. 36 and 37, par. No. 2.)

That the enforcement by Raphael of this direct obligation to pay assumed by Dempsey, Drake and Buff was not an interference with any *res* held by the receiver is well shown by the Circuit Court of Appeals in its decision as follows:

> "It might be said that a bond would take the place of the property purchased, if Dempsey had promised to pay the receiver the purchase price (the 30 per cent of the claims of the creditors). In that case the receiver would have been entitled to receive the money from Dempsey or sue on the bond with the duty of paying out as assets of the estate such funds as he might receive and the District Court would have had exclusive jurisdiction to direct such proceedings. But that is not the situation here. The assets of The Stores were delivered to Dempsey on his promise to pay the creditors 30 per cent of their claims, and the liabilities and expenses of the receiver. To protect the creditors a bond was required and given running to the United States of America conditioned on the fulfilment of Dempsey's promise to pay the creditors. . . . All the assets of the receivership having thus passed from the jurisdiction of the District Court without reservation and the creditors having to look to the purchaser

rather than to the receiver for the payment of the dividends on their claims, all that remained for that court to do was to allow the claims of the creditors and settle the account of the receiver. There was no *res* in the custody of the District Court and there were no matters left over requiring judicial action of that court in relation to the receivership property or to any rights litigated in the receivership proceedings making necessary any further orders or decrees to establish the rights of the parties therein, which were or could be interfered with by the suit in the state court. The suit in the state court is not against The Stores or its assets in the custody of the federal court, but is one *in personam* against certain parties, strangers to the receivership proceedings, who have given a bond conditioned to pay Raphael's claim against The Stores." (Rec. pp. 75 and 76.)

The same principle has been applied in suits to enforce the obligation on bonds to dissolve attachments.

Carpenter v. Turrell, 100 Mass. 450.
Guaranty Security Corp. v. Oppenheimer, 243 Mass. 324 at 326.

Carpenter v. Turrell, ubi supra, was a case involving a bond to dissolve an attachment. In that case, Wells, J., says at p. 452,

> "The plaintiffs contend that the bond is a mere substitute for the attachment, and therefore that it should stand in all respects as its precise equivalent. But such is not the purpose of the bond, nor the intention of the statute which authorizes it to be given. It does not merely restore the possession of the property to the debtor subject to the attachment; it dissolves the attachment. It is, in many respects, a higher and better security for the creditor than the attachment. . . . The bond, although a substitute for the attachment, is not its equivalent, and has not its incidents."

The receiver contends that in the case at bar the United States was somehow the real party in interest and he gives this contention as a reason for his assertion that suit could be brought on the bond only by him as receiver. As a basis for this contention, he cites *U. S. F. & G. Co. v. Kenyon*, 204 U. S. 349, 27 S. Ct. 381. In that case the United States had received a bond from a contractor under a contract made direct with the government for the construction of a public building. The United States was a party to the contract and was, of course, vitally interested in its performance. There "the United States had an interest in the bond and was a real party plaintiff," as the Circuit Court of Appeals says in its decision. In the case at bar, on the other hand, the United States Government, as such, had no interest in the Monroe Stores, Inc. or in its creditors. If Dempsey's bond had named some other obligee, the government could not have complained. The distinction between the two cases seems too clear to require further comment.

The view taken by the Circuit Court of Appeals is well supported by the authorities.

Howard v. U. S., 184 U. S. 676; 22 S. Ct. 543.
Maryland v. Baldwin, 112 U. S. 490; 5 S. Ct. 278.
Alexander v. Union Surety Co., 85 N. Y. S. 282; 11 A. B. R. 32.
U. S. ex rel. v. Ruggles, 221 Fed. 256; 34 A. B. R. 91 (C. C. A.).
2 Remington on Bankruptcy, 3rd ed., sec. 1090, p. 441.

In *Maryland v. Baldwin, ubi supra,* the United States Supreme Court had before it a case of a suit to enforce the obligation of an administrator's bond given by the admin-

istrator to the state of Maryland. In an opinion written by Field, J., the court says at p. 278:

> ". . . The state is only a formal plaintiff, the actual litigation being between the other parties. By the law of Maryland, the bond of an administrator is taken to the state, but is held for the security of persons interested in the estate of the deceased. The name of the state is used from necessity when a suit on the bond is prosecuted for the benefit of a person thus interested, and, in such cases, the real controversy is between him and the obligors on the bond."

II. The bill in equity in the State court was a proceeding in personam, and the receiver was a total stranger to those proceedings and to the property of Drake and Buff which this respondent sought to reach and apply.

The suit instituted in the State court was *in personam* —to enforce the personal obligation of the principal and sureties. It did not seek to reach any property held by or conveyed by the receiver. It merely sought to enforce and satisfy the direct obligation of the sureties to a creditor by reaching and applying property owned by the sureties personally.

The receiver was not a party to the State court proceedings. In fact, the record shows that by the conveyance to Dempsey he had parted with all the assets which came into his hands as receiver of Monroe Stores, Inc. He owed no further duties to the creditors,—they were to look to the obligation under the bond for their dividends. The only reason why he was not discharged as receiver was that his fees and receivership obligations remained to be paid, and these were to be paid, not out of any fund in his hands, but by Dempsey (Rec. p. 13, par. 2). It is to this extent

only that the receiver has any interest in enforcing the bond.

There was no contractual relation between the receiver and Raphael, and the receiver was never requested, either expressly or impliedly, to represent Raphael's claim in any way. On the contrary, the receiver knew, before he began his ancillary bill, that Raphael had himself instituted proceedings seeking to enforce the obligation on the bond for his benefit (Rec. p. 37, par. 3).

In *U. S. Mortgage Co. v. Missouri Railway Co.*, 269 Fed. 497, the Circuit Court of Appeals says at p. 501,

> "Where an attempt is made to take property out of his (receiver's) possession, then he is a proper party to litigation, and where relief is sought against 'his acts' as such receiver he is the proper party litigant. But where the litigation affects the rights of parties in property not in his hands, or asserts rights in such property without disturbing his possession thereof, he is not a proper party, much less an indispensable party, to such litigation. *Continental Trust Co. v. Toledo & C. Ry. Co.*, 82 Fed. 642, 646.
> "The receiver does not represent the justiciable rights of the parties to the litigation of which he is the receiver, but only the protection of the property in his hands as such, or the collection of that to the possession of which as receiver, he is entitled."

The receiver cannot, and does not, even so much as claim any title or interest in the shares of stock, the mortgages, and real estate belonging to Drake and Buff personally which Raphael seeks to have reached and applied in the State court proceedings. It is clear that the receiver has no interest, legal or equitable, in that property.

Raphael commenced the State court proceedings, with the consent of the United States District Court, and the record shows that those proceedings involved much effort, and consequent expense to this respondent. He obtained attachments on certain property of Drake and Buff and preliminary injunctions restraining the transfer of certain shares of stock belonging to them. It is clear that those preliminary injunctions issued by the State court gave to Raphael equitable liens with respect to those shares of stock, just as the attachments created legal liens on the property attached.

Snyder v. Smith, 185 Mass. 58.
Rioux v. Cronin, 222 Mass. 131.
Metcalf v. Barker, 187 U. S. 165; 23 S. Ct. 67.

In *Rioux v. Cronin, ubi supra*, Rugg, C. J., says at p. 137:

> "The filing of such a bill under the statute, (a bill to reach and apply) accompanied by the issuance of an injunction, does create a lien in favor of the creditor."

The order of the District Court was rightly reversed, for it deprived this respondent of said legal and equitable liens on the property of Drake and Buff, obtained by him in proceedings brought in accordance with the permission granted him by the U. S. District Court. (Rec. p. 12.)

On the other hand, the receiver did not even have a lien of any kind on any of the property of Drake and Buff which this respondent sought to reach, for it is to be noted that the temporary injunctions (Rec. p. 21) issued by the District Court on the ancillary bill of complaint, were not continued. The final decree entered on the ancillary bill,

with the receiver's consent, merely ordered a personal judgment and execution (Rec. p. 23). The temporary injunctions of the Federal court against Drake and Buff were thus dissolved by its own final decree, leaving the receiver with no semblance of a claim for an equitable lien on Drake's and Buff's property.

Sweeney v. Hanley, 126 Fed. 97 (C. C. A. 9th).
Musgrave v. Staylor, 36 Md. 123.
Jackson v. Bunnell, 113 N. Y. 216.
Gardner v. Gardner, 87 N. Y. 14.

In *Sweeney v. Hanley, ubi supra*, the United States Circuit Court of Appeals for the ninth circuit says at p. 99, that the temporary injunction issued in that case had "come to an end by the entry of the final decree in the cause making no provision for any injunction."

It is true that the receiver had a right to enforce the bond for the payment of his administration expenses, counsel fees, etc., under a separate and distinct paragraph of the offer (Rec. p. 13, par. 2). But in so doing he stood no better, with respect to reaching property of Drake or Buff, than any other creditor of theirs.

In *McBride v. Little*, 115 Mass. 308, the court says at p. 309:

> ". . . The mere fact that a judgment in a suit brought against a debtor will lessen his ability to pay his other debts, does not create in his other creditors such a legal interest as entitles them to be heard upon the questions involved in the suit or to enjoin its prosecution."

It is thus clear that this receiver is a mere stranger to the respondent, without any title or right in the property

of Drake and Buff which was sought to be reached and applied in the State court and without any rights of action against this respondent and that the receiver had no standing to entitle him to an injunction to restrain proceedings in a State court against third parties.

III. The District Court was without jurisdiction to enjoin the proceedings in the State court.

Even aside from the receiver's lack of any standing or right to entitle him to any relief as against this respondent, the District Court was without jurisdiction to issue any injunction against the respondent.

28 U. S. C. A., sec. 379, provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This clearly shows the intent of Congress to prevent injunctions by Federal courts for the stay of proceedings in State courts, except where bankruptcy proceedings are involved. Under general principles of jurisdiction and comity of courts, three apparent exceptions have been recognized to the fiat of Congress above referred to. These are:

a. Where a cause has been removed from the State court to the Federal court, the latter can enjoin any other proceedings in a State court for the same cause.

Kern v. Hendikoper, 103 U. S. 494.

b. The Federal court has jurisdiction in equity to restrain the enforcement of a State court judgment where the latter has been obtained by fraud, etc., under general equity powers.

Marshal v. Holmes, 141 U. S. 589, 12 S. Ct. 62.

c. The Federal court can enjoin proceedings in a State court where the latter proceedings will interfere with the possession of property in the custody of a Federal court or officer or where the title to property already passed upon by the Federal court will be relitigated in the State court.

Julian v. Central Trust Co., 193 U. S. 93, 24 S. Ct. 399.

Kline v. Burke, 260 U. S. 226; 43 S. Ct. 79.

B. But where the suit in the State court is merely one *in personam* the Federal court cannot enjoin the State court proceedings.

Kline v. Burke, 260 U. S. 226; 43 S. Ct. 79.

In that case the Supreme Court held by Sutherland, J., at p. 229:

> "It is settled that where a Federal court has first acquired jurisdiction of the subject matter of a cause, it may enjoin the parties from proceeding in a State court of concurrent jurisdiction, where the effect of the action would be to defeat or impair the jurisdiction of the Federal court. Where the action is *in rem*, the effect is to draw to the Federal court the possession or control, actual or potential, of the *res*, and the exercise by the State court of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the Federal court already attached * * *

> "But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. * * * The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded."

The question then arises what is a proceeding *in personam*. The answer can best be found by an examination of the cases which have passed upon the exact situation as in the case at bar. From these cases the rule may be stated as follows:

Where a purchaser at a receiver's sale agrees as part of the purchase price to assume and pay the debts of the insolvent corporation, an action brought by a creditor of the corporation against the purchaser in the State court upon that promise to pay is a suit *in personam* and cannot be enjoined by the Federal court in which the receivership is pending, because such an action involves no lien upon, title, or interest in the specific property in the dominion of the Federal court and does not interfere with the disposition thereof by its decree.

Guardian Trust Co. v. Kansas City Southern Ry. Co., 146 Fed. 337.

Guardian Trust Co. v. Kansas City Southern Ry. Co., 171 Fed. 43.

Western Union Co. v. U. S. Trust Co., 221 Fed. 545.

Ex parte Equitable Trust Co., 231 Fed. 571, 591.

International Ry. Co. v. Binford, 10 F. (2) 496. Cert. denied, 273 U. S. 694, 47 S. Ct. 91.

Magid v. Westmoreland, 15 F. (2) 884, aff. in 15 F. (2) 885.

Richle v. Margolies, 279 U. S. 218, 49 S. Ct. 310.

Texas & P. Ry. Co. v. Johnson, 151 U. S. 81, 14 S. Ct. 250.

In *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 146 Fed. 337, the Guardian Trust Co. was a creditor of the Kansas City Suburban Belt Railroad Co. A receiver was appointed by the Federal court upon a proceeding to foreclose a mortgage on that railroad. Upon the sale a reorganization committee purchased the railroad and turned it over to a new corporation called the Kansas City Southern Railway Co. The decree of foreclosure contained the usual provisions that the purchaser should pay the cost of foreclosure, the receiver's liabilities and such claims as should be adjudged "prior in lien or superior in equity to the mortgage foreclosed herein upon the property sold." Thereafter, the Trust Co. brought suits at law in the State court of Missouri claiming personal judgments against the Southern Railway Co. on the ground that the latter had assumed and agreed to pay the debts of the Kansas City Suburban Belt Rd. Co. but not because the debts were "prior in lien or superior in equity to the mortgage." Thereupon the Southern Railway Co., by an ancillary bill in the Federal receivership proceeding, obtained an injunction in that court prohibiting the Trust Co. from prosecuting the suits in the State court. The Trust Co. appealed. The Circuit Court of Appeals speaking by Sanborn, J., reversed the order for the injunction and says, at p. 341:

> "* * * The actions at law are founded upon no lien and upon no claim of lien upon any of the property mortgaged and sold under the decree of the court be-

low. They rest upon the single claim that the Southern Company has both impliedly and expressly promised to pay the claims which they disclose to the trust company and the only relief which the latter seeks in them is a general judgment that it may recover the amount of these claims from the Southern Company. How, then, can these actions in any way invade the exclusive jurisdiction, or impeach the decree of the court below or the title of the Southern Company thereunder. * * *

(At p. 342) * * * * "The actions at law here under consideration are against the purchaser, and they rest upon its independent liability, not upon that of the mortgagor, and the lien of the levies under the judgments, if any, should be rendered therein, will be neither prior in right nor superior in equity to the lien of the mortgage, but will be effective only because the debtor, the Southern Company, has acquired the title to the property and has thereby made it liable for its personal obligations. When a judgment debtor takes title to property which he buys at a foreclosure sale or otherwise, the judgment against him immediately settles upon it. When a debtor buys such property it becomes liable to be seized under any judgment that may be subsequently rendered against him.

(At p. 343) * * * * "Our conclusion is that the order for a temporary injunction herein was improvidently granted because an action for a personal judgment against the purchaser at a foreclosure sale upon its alleged liability to pay a debt of the mortgagor founded on the execution of a plan of reorganization under which the purchaser was incorporated and under which it bought the property is not an invasion of the exclusive jurisdiction of the court which rendered the decree, usually reserved, to determine the priority and superiority of other liens to the lien of the mortgage nor an impeachment of the decree or of the title thereunder."

This case has been cited with approval in

Kline v. Burke, 260 U. S. 226, 43 S. Ct. 79.

In *Western Union Tel. Co. v. U. S. & M. T. Co., et al.*, 221 Fed. 545, the Western Union Co. was a creditor of the Kansas City, Mexico & Orient Railway Co. A receiver was appointed by the Federal court upon a proceeding to foreclose a mortgage on that railway. After the sale the Western Union and other creditors brought suit in the State court of Kansas against the purchaser at the foreclosure sale charging that the purchase was not made in good faith and praying that the purchasing company be restrained from issuing certain stocks and bonds. The Federal court enjoined such suits in the State court and the Western Union appealed. The Circuit Court of Appeals, in reversing the order for the injunction, says at p. 549:

> "A purchase through a foreclosure sale, or otherwise of the property of an insolvent corporation by a new corporation, pursuant to a plan or scheme of the bondholders and stockholders of the insolvent company, whereby the stockholders thereof derive, by receipt of stock or bonds of the new company, or otherwise, benefits equal to or greater than those received by, or openly offered to and rejected by, its general creditors, is fraudulent in law as to the latter, and renders the new corporation and the property it purchased at such sale liable for the claims of such creditors against the old company, at least to the extent of the value of the interest secured by the stockholders of the old company in excess of the value of the interest secured by, or openly offered to and rejected by, the unsecured creditors. * * *
>
> At p. 555 * * * * "The prosecution or threatened prosecution in other courts by creditors of a mortgagor of actions *in personam* against the purchaser at a foreclosure sale under a decree of the foreclosing court, or against those claiming under him, upon alleged promises or legal liabilities made or incurred by such parties to pay the debts of the mortgagor to such creditors, presents no ground for an injunction against such actions by the foreclosing court, because such actions involve no lien upon, title, or interest in the specific prop-

> erty in the dominion of the foreclosing court, and do not interfere with the disposition thereof by its decree."

Another case bearing strongly on the case at bar is *International-Great Northern Rd. Co. v. Binford, ubi supra.* There the International and Great Northern Rd. Co. had gone into the hands of an equity receiver appointed by the United States District Court, and its property was sold by the receiver under a foreclosure decree to a new corporation organized for that purpose. The decree of sale provided that the property was sold subject to claims prior in equity to the mortgage. Thereafter the Concrete Company, a creditor of the old railroad company, whose claim accrued for current expenses of operation within two years of the receivership, sued the purchaser in the Texas State court, on the ground that the purchaser was charged with the payment of the debts of the old company and on the ground that a fraud had been practiced by the purchaser, in that stockholders of the old company received benefits from the organization of the new company and from the purchase by it, whereas no provision was made for claims such as this creditor held. That suit, in the Texas court, resulted in a judgment for the creditor. Thereupon the purchasing corporation, (or rather its successor) brought a bill in the United States District Court to enjoin the sheriff from enforcing the judgment. The District Court denied the prayer for injunction. In affirming this denial, the United States Circuit Court of Appeals for the Fifth Circuit said at p. 498:

> "Evidently the purpose of the quoted reservations was to prevent the sale of the property from affecting the court's power to subject it to claims which would have been enforceable against it by the court if it had remained in the court's custody * * * * * The suit brought by the Concrete Company did not assert a

claim that the debts it held were chargeable against the property sold under the above-mentioned decree when title to that property was acquired by the purchaser at such sale * * * * * The other claim asserted in the suit brought by the Concrete Company likewise was based on alleged transactions subsequent to the acquisition of title to the property by the purchaser at the sale under the court's decree. In our opinion that suit did not involve controversies which were ancillary and dependent on the receivership and foreclosure suit. The rule as to the ancillary jurisdiction of a court to deal with claims in respect of property there impounded was stated and applied in the case of *Central Union Trust Co. v. Anderson County*, 268 U. S. 93, 45 S. Ct. 427. The statement of the jurisdiction by no means indicates that it has such a scope as to enable a court to draw to itself the determination of any claim of an interest in or a charge upon property impounded which did not come into existence until after the court surrendered custody and control and after the owner through the sale of the property under the court's decree was free to subject it to liability * * * * * The claims sought to be brought before the court for adjudication by the proceeding instituted by the appellants were not within the ancillary jurisdiction which was invoked, as they did not accrue until after the sale under the court's decree of the property affected by them."

C. Cases of very similar nature in which it was held that a Federal court could not restrain State court proceedings *in personam* against the purchaser from the Federal receiver and in which the distinction between suits *in personam* and suits *in rem* is drawn are:

Texas v. P. Ry. Co. v. Johnson, 151 U. S. 81, 14 S. Ct. 250.

American Brake Shoe Co. v. Pere Marquette Ry. Co., 263 F. 237 and 278 F. 832.

In re Kantor & Cohen, 121 Fed. 984.

U. S. Mort. Co. v. Mo. Ry. Co., 269 Fed. 497; cert. denied 41 S. Ct. 538, 256 U. S. 699.
Lassiter v. Norfolk Ry. Co., 79 S. E. 264 (S. E.).
Railroad v. Manton 164 U. S. 636, 17 S. Ct. 216.

D. Cases in which the Federal court have enjoined State court proceedings against the purchaser from a Federal receiver are expressly based upon three necessary requisites, namely,

1. That the decree of sale reserves to the Federal court the power to determine all matters relating to the purchaser's rights and liabilities.

2. That the decree of sale reserves to the Federal court the power to retake and resell the property if the purchaser does not carry out his agreement.

3. That the State court proceedings will affect the specific property that was transferred to the purchaser.

Wabash Rd. v. Adelbert College, 208 U. S. 38, 55, 28 S. Ct. 182, 186, 188.
Julian v. Central Trust Co., 193 U. S. 93, 24 S. Ct. 399.
Stewart v. Wisconsin Cent. Ry. 117 Fed. 782.

Where no one of the three requisites is present the injunction will always be refused.

Chicago Great Western Ry. v. Hulbert, 205 Fed. 248, 250.
Am. Brake Shoe Co. v. Pere Marquette Ry. Co., 263 Fed. 237.

It is therefore respectfully submitted that the Circuit Court of Appeals was clearly right in holding that the District Court had no jurisdiction to restrain this respondent from prosecuting the State court proceedings.

IV. No question of preference is involved.

According to the affidavits filed by Drake and Buff when they became sureties on the bond, their aggregate net worth was in excess of three-quarters of a million dollars (Rec. pp. 5 to 8). The master, in the State court proceedings, found them to be possessed of substantial amounts of property (Rec. pp. 50, 51 and 52). As late as October 7, 1931, the receiver himself alleged that "said Louis F. Buff and Clifford S. Drake are financially able to pay the full amount of the judgment rendered against them in this cause and have in their possession and under their control assets, of which they are the actual owners, sufficient to satisfy in full the judgment in this cause." (Rec. p. 26.) This was only about seven weeks before November 27, 1931, the date of the filing of the receiver's motion to restrain the State court proceedings (Rec. p. 30). There is no allegation and no evidence that Drake and Buff are insolvent and certainly they are not in bankruptcy, nor are their assets in the hands of a receiver of the Federal court.

No question of unlawful preference by one creditor over another can be involved in the absence of bankruptcy. It is clearly established that where, by a payment by a debtor to one creditor "a preference of one creditor over another is thereby produced," that is nothing unlawful at common law. "There are no classes of creditors at common law outside the bankruptcy act."

Rubenstein v. Lottow, 223 Mass. 227 at 230, per Rugg, C. J.

Cosmopolitan Trust Co. v. L. Agoos Tanning Co., 245 Mass. 69.

The receiver's contentions as to preference are, therefore, untenable.

It is therefore respectfully submitted that no novel question is involved in the decision of the Circuit Court of Appeals; that the decision is based on principles well established by the authorities and that the petition for writ of certiorari should be denied.

Respectfully submitted,

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